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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 735

GAMBLE-SKOGMO, INC.,

Petitioner

vs.

WESTERN AUTO SUPPLY COMPANY AND BENEFICIAL FINANCE CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Gamble-Skogmo, Inc., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on July 19, 1965, in the above entitled case.

OPINIONS BELOW

The opinion of the court below (Appendix A, p. A-1) is reported at 348 F. 2d 736. The opinion has also been reported in CCH Federal Securities Reporter Current Decisions. The opinion of the District Court (R. p. 164) on the merits is reported at 231 F. Supp. 456.

JURISDICTION

The judgment of the court below (Appendix B, p. A-20) was entered on July 19, 1965. A timely petition for rehearing was denied on August 13, 1965 (Appendix C, p. A-22). The jurisdiction of this Court is involved under *28 U.S.C.* Section 1254 (1).

QUESTIONS PRESENTED

The questions presented, on substantially all of which the Court below, after eight months of consideration, reversing the District Court divided two to one, all involve the proper interpretation of Section 16(b) of the Securities Exchange Act of 1934, *15 U.S.C.A.* 78 p(b). They are:

1. Whether petitioner's act of acquiring for transfer 32,000 shares of stock of Western Auto of Missouri and immediately transferring 25,942 shares at its cost of $32.-35 per share to meet its obligations to a Profit Sharing Trust can be deemed a "purchase" under 16(b) and made the basis for later penalties.

2. Later, as a result of an antitrust suit, petitioner sold its entire stock holdings in Western Auto of Missouri, including 6,058 shares not transferred to the Trust Fund, at $36 per share. The question is whether this sale can be deemed a "sale" under 16(b) and made the basis for later penalties so far as any part of the 25,942 shares transferred to the Trust Fund are concerned, the Fund being a separate entity.

3. If the answers to questions 1 and 2 are yes, was there a profit "realized"?

4. And if so, does it properly include dividends on

stock not owned by petitioner and not received by it, or, in fact, dividends on any stock at all?

5. Is the application of Section 16(b) by the Eighth Circuit so as to include dividends not received by the petitioner a violation of constitutional safeguard?

6. Is interest properly chargeable against any part of any judgment against petitioner in this matter?

STATUTES INVOLVED

Section 16(b) of the Securities Exchange Act of 1934, *15 U.S.C.A.* 78 p(b) provides as follows:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall

not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

STATEMENT

As of January 1, 1960, the petitioner, Gamble-Skogmo, Inc., defendant below, was the beneficial owner of more than 10% (1,256,044 shares) of common stock issued by Western Auto Supply Company, a former Missouri corporation, hereinafter called "Western Missouri". Prior to January 15, 1960, there was due and owing from Gamble-Skogmo to its employees' Profit Sharing-Stock Bonus Trust Fund an unliquidated obligation subsequently determined to be the sum of $839,251.78. On January 15, 1960, the Gamble-Skogmo Executive Committee approved the purchase of 32,000 shares of Western Missouri common stock for the purpose of contributing them, or as much thereof as would be necessary, to the Trust Fund in order to satisfy Gamble-Skogmo's 1959 obligation, the exact amount of which was then unknown. The selection of the number of shares of such stock to be purchased January 15, 1960, viz., 32,000 shares, was based upon the best estimate then available as to the largest number of such shares which it was believed might be necessary to satisfy Gamble-Skogmo's obligation.

On January 21, 1960, Gamble-Skogmo actually purchased this 32,000 shares of Western Missouri common stock at $32.35 per share through Allen and Company, an investment securities dealer. On January 27, 1960,

Allen and Company delivered to Gamble-Skogmo the required number of share certificates of Western Missouri bearing street names (not designated by Gamble-Skogmo) and endorsed in blank. Immediately upon receipt of the stock, on January 28, 1960, Gamble-Skogmo caused 25,942 shares of this stock to be transferred to the Trust Fund, with a check for $28.08 to make up the required $839,251.78 in pursuance of its plan of contribution. The specific dollar amount to be contributed by Gamble-Skogmo to the Trust Fund was determined about January 28, 1960, and in any event subsequent to January 21, 1960. The remaining 6,058 shares of the 32,000 shares of Western Missouri thus purchased were then transferred to Gamble-Skogmo on the stock records of Western Missouri bringing its total ownership to 1,262,102. All of these shares were sold to the Beneficial Finance Co. on July 11, 1960, for a price of $36.00 per share.

In the interim from the date of receipt of the 6,058 shares to July 11, 1960, Gamble-Skogmo had received dividends on its Western Missouri stock totaling 70 cents per share. And the Trust Fund received dividends on its 25,942 shares in the same amount.

On July 28, 1961, Beneficial and Western Missouri agreed to merge into Beneficial. The merger was completed on October 27, 1961. On the same date, Beneficial sold all its Western Missouri assets to Western Auto Supply Company, a Delaware corporation, hereinafter referred to as "Western Delaware".

In December of 1961 pursuant to a request from the President of Western Delaware demanding an accounting of the profits realized on the 32,000 shares which Gamble-Skogmo had acquired for transfer and for the dividends

paid thereon, Gamble-Skogmo paid Western Delaware $22,111.70, the difference between the price it received and the price paid for the 6,058 shares of Western Missouri retained by it, but refused to make any payment on the 25,942 shares which it had delivered to the Trust Fund. It is admitted that these shares were contributed to the Trust Fund at the exact cost of $32.35 per share, which with its check for $28.08 made the exact contribution which Gamble-Skogmo was required to make to the Trust Fund under the formula in the Trust Agreement.

No payment was made on the dividends received by Gamble-Skogmo on the 6,058 shares, and no payment was made on dividends received by the Trust Fund on its 25,942 shares.

At the date of sale to Beneficial by Gamble-Skogmo, a Civil Anti-trust Action 12776 (commenced April 1, 1960) was pending in the United States District Court for the Western District of Missouri, Western Division in which the United States was seeking to require the divestiture by Gamble-Skogmo of its then holdings of Western Missouri. During the course of this antitrust litigation, the petitioner, with a view to disposing of that matter, had made several attempts to dispose of its holdings in Western Missouri. Immediately following the sale to Beneficial, which sale was discussed with the Department of Justice by the intervenor and the defendant prior to its consummation, on July 18, 1960, the antitrust action in the Western District of Missouri was terminated by a Consent Decree which recognized the sale to Beneficial and in substance enjoined the defendant from owning shares of Western Missouri in the future.

But for the actions of the United States of America in

the Civil Action above referred to, no disposition of Western Missouri shares by the defendant would have been undertaken or consummated during the six months period commencing January 21, 1960. The defendant had no plans for disposing or attempting to dispose of these shares prior to the action of the United States government referred to herein.

Prior to the entry of the Consent Decree July 18, 1960, Gamble-Skogmo was under no obligation from the courts to dispose of its Western Missouri common stock within the six months period commencing January 21, 1960, but it was under a preliminary injunction restricting the persons to whom it could sell Western Missouri stock during this period. At no time did Gamble-Skogmo admit the claims upon which the government was basing its complaint.

The District Court of Minnesota also found as facts that the 25,942 shares which passed into the holdings of the Trust Fund were simply handled by Gamble-Skogmo as a conduit for the purpose of enabling the Trust Fund to place among its assets this number of shares; that the Trust Fund was not the alter ego of Gamble-Skogmo; and that this transfer was not an example of short swing trading. Also it found that there is absolutely no danger that a matching of stock certificates in this case will allow a circumvention of the Act.

The jurisdiction of the Federal Court in the first instance was invoked pursuant to the provisions of the Securities and Exchange Act of 1934, *15 U.S.C.A.*, Section 78 aa, to interpret the provisions of Section 78 p(b) of that Act.

REASONS FOR GRANTING WRIT

This matter involves important questions of interpretation of Section 16(b) of the Securities Exchange Act of 1934. The office of the General Counsel of the Securities and Exchange Commission has advised us that because it agrees with the decision below on the merits, it is not in a position to support our request for the grant of certiorari. On the other hand, the office of the General Counsel has informed us that it has no objection to our stating to the court that in its view this case does in fact involve important areas in the administration of the Securities laws in which the Supreme Court has not previously spoken.

(a) The Eighth Circuit Decision Conflicts With General Principles Of Statutory Interpretation Set Forth By The Supreme Court.

The decision of the Eighth Circuit Court in the present case is a triumph of form over substance in the interpretation of a Federal Statute.

Judge Nordbye in the District Court of Minnesota supported by Judge Van Oosterhout of the Eighth Circuit, found as a fact (R. p. 173) that the 25,942 shares which passed into the holdings of the Trust Fund were simply handled by Gamble-Skogmo *as a conduit* for the purpose of placing these shares in the Trust; that this was not an example of short swing trading, that there was absolutely no danger that a matching of certificates would allow a circumvention of the Act (R. p. 173) and states (R. p. 173):

> "Under the circumstances here, the Court is not required to adopt some fiction in order to put teeth into the law."

The Securities and Exchange Commission in its amicus curiae brief in the Circuit Court disagreed with Judge Nordbye on the facts, but agreed that if his finding of fact concerning a conduit was correct, so was his conclusion (Appendix A, p. A-18).

> "Judge Nordbye's conclusion that appellee acted as a 'conduit' for the purpose of making the purchase for the Trust Fund appears to be without support in the record. * * * If, however, appellee had, in fact, confined its activities in connection with the questioned transactions to acting solely as agent for the Trust Fund, the trial court's result might have been reached without endangering the principles which we feel must not be impaired."

In the light of the Supreme Court's comments in *Blau v. Lehman*, 368 U. S. 403, in which the Securities and Exchange Commission appeared, this use by the S.E.C. of the word "agent" cannot be considered as referring to an ordinary principal-agent relationship where the agent's implied inside knowledge of Western Auto's affairs would be controlled or governed by the Trust Fund.

The Eighth Circuit Court apparently adopts the foregoing findings which the dissenting opinion specifically points out are supported by substantial evidence (Appendix A). But having adopted them, it ignores them and in order to prevent Gamble-Skogmo from accomplishing a result which Gamble's own actions made impossible (i.e., "realizing a profit" from its fiduciary position) the court chooses a very narrow and technical interpretation of Section 16(b) based apparently upon the law of sales. In so doing, in effect, it overrules or vitiates the findings of fact in the lower court and turns fact into fantasy.

And, incidentally, its insistence on narrow interpretations and definitions of key words of the statute can hardly be considered uniform, for while it carefully points out the alleged precise legal import of the words "purchase" and "sale" and their unchanging content, it is at considerable pains to point out (Appendix A, p. A-11) that "profit" under 16(b) does not in fact have a plain and ordinary meaning at all, despite the court's assertion elsewhere (Appendix A, p. A-10) that it does. In the particular paragraph of its opinion describing "profit", the court purports to rely upon a rule established in the case of *Smolowe v. Delendo Corp.*, 136 F. 2d 231, to fit a particular situation, without apparent realization that neither facts giving rise to the rule nor the reason for its existence are here present.

This action and technical interpretation of 16(b) by the Eighth Circuit is at variance with the instructions of the Supreme Court on interpreting Federal Statutes of a remedial or regulatory nature. In *United Gas Improvement Co. v. Continental Oil Co.*, 85 S. Ct. 1517, involving the Natural Gas Act the Supreme Court has recently spoken on this matter, in a case in which a definition of the word "sale" was passed upon.

> "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law. The Court recognized as much in National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170, when it held that 'employee' as used in the National Labor Relations Act was to be defined by reference 'to the purpose of the Act and the facts involved in the economic relationship' (id., at 129, 64 S. Ct., at 860) rather than exclusively by reference to common law standards or local law."

An Act such as Section 16(b) is admittedly remedial, broadly remedial, and even referred to as "involving a prophylactic" effect, *Blau v. Lehman*, 368 U. S. 403. As a matter of public policy the purpose of an Act and the facts involved in the economic relationships in an individual case must determine its application.

If this rule were not so, Federal Statutes and their objectives would be subject not merely to technical and varying common and local law concepts, but to the ingenuity of those persons who could circumvent the substantive purpose of the Act, and by various ingenious legal forms produce the same prohibited result. Clearly far more defendants would escape Congressional prohibitions, than would come under them, if the art of the legislative draftsman were an invitation to a mere change of form, to circumvent the purpose of the law.

But since the established rule of law makes the purpose of the statute control the application, this petitioner is entitled to have the benefit of the rule. To use a different criterion, one of technical interpretation, merely because the established rule does not produce a result felt to be desirable, is manifestly unjust.

(b) Treatment Of Problem By Other Circuits.

In any Circuit except the Eighth Circuit, Gamble-Skogmo would have had the benefit of the application of 16(b) exactly in conformity with the rule laid down by the Supreme Court. The Second, Sixth and Ninth Circuits all reject holding that the words of 16(b) are literal whether "purchase", "sale", "profit realized", or others, or that they have a plain ordinary meaning, or are of precise legal import.

As stated in *Blau v. Lehman*, 286 F. 2d 786 (affirmed 368 U. S. 406) in the Second Circuit by Judge Medina:

> "But the underlying principle, as I understand it is that the transaction is a purchase if in any way it lends itself to the accomplishment of what the statute is designed to prevent. * * * *There is no rule of thumb, nor would it be wise to attempt to formulate such a rule*" (Italics supplied).

This principle is followed in the Courts of that Circuit up to and including *Blau v. Lamb* (S.D.N.Y. May, 1965), 292 F. Supp. 151, in which the Court stated:

> "The test (e.g. as to the meaning of the words) succinctly stated is whether or not the transaction lends itself to the accomplishment of what the statute is designed to prevent."

The Sixth Circuit has specifically adopted the rule of the Second Circuit. *Ferraiolo v. Newman*, 259 F. 2d 342.

> "The standard that emerges from these decisions can be simply stated: Every transaction which can reasonbly be defined as a purchase will be so defined *if the transaction is of a kind which can possibly lend itself* to the speculation encompassed by Section 16(b)" (Italics supplied).

The Ninth Circuit uses the same test. *Blau v. Max Factor & Co.*, 342 F. 2d 304 (1965) (306-07).

> "A transaction is held to be a purchase if in any way it lends itself to the accomplishment of what the statute is designed to prevent. * * * *On the other hand to avoid purposeless harshness*, a transaction is held not to be a section 16(b) purchase if it was not one that could have lent itself to the practices which 16(b) was enacted to prevent" (Italics supplied).

There can be no doubt that if the Eighth Circuit continues to apply 16(b) in the manner and spirit it did in this case, as contrasted to the spirit manifested in other circuits and the rules followed in them, the geographical location of any future defendants is going to have a tremendous impact upon their potential liability. And we respectfully suggest that Gamble-Skogmo's geographical location has had just such an impact here. Uncertainty will prevail and a definite criterion for judging actions even in the Eighth Circuit will be non-existent, where the precise legal meanings and even the plain and ordinary meanings of "sale", "purchase" and "profit" may differ from state to state, and where even the very situs of an action can determine the law of the state which applies.

(c) Principles of Blau v. Lehman, 368 U. S. 403.

In the case of *Blau v. Lehman,* this Court ruled the "prophylactic" effect Congress clearly prescribed could not be added to by attributing to an insider profits from transactions realized by parties who were not insiders.

> "It would be nothing but a fiction to say that Thomas 'realized' all of the profits earned by a partnership of which he was a member. It was not error to refuse to hold Thomas liable for profits he did not make."
>
> *Blau v. Lehman,* 368 U. S. 403, p. 415.

And it further held that "short swing profits" realized by outsiders acting on the basis of inside information or having the possibility of inside information, cannot be recovered from either an insider or an outsider, at least in the absence of showing that the insider is the alter ego or deputy of the outsider in his relationship to the issuer.

But in reaching the conclusion it did, the Circuit Court in this instance is unquestionably seeking to make Gamble-Skogmo disgorge benefits or profits which were in fact received by the Trust Fund, and to do so it adopts the fiction that what was not in fact a trading operation or profit making opportunity by Gamble-Skogmo by any stretch of the imagination, was in legal effect some mysterious form of short swing trading activity. Whatever evil may be involved or imagined in connection with an insider contributing to the assets of a company profit-sharing trust fund, shares of stock which it feels will be beneficial to the fund, it is inconceivable that such evil was one of the abuses whose cure is clearly prescribed by Congress as part of the "prophylactic" effect of Section 16(b). The acquisition for transfer and transfer of the 25,942 shares was not a trading activity by Gamble-Skogmo at all.

Just as certainly as the petitioners in the *Blau* case were seeking to charge Thomas for all profits made by a third party (Lehman), the plaintiffs in this action are seeking to recover profits from Gamble-Skogmo made or available to the Trust Fund, although here, unlike the *Blau* case, Gamble-Skogmo had no interest in the Fund at all. And the Eighth Circuit in reversing the District Court, has failed to follow the principles laid down by the Supreme Court in rejecting such an attempt in the *Blau* case. Clearly under the *Blau* case Gamble-Skogmo could have transferred cash to the Fund, given it inside information if it had any, and the Fund then acquired the 25,942 shares. But the Eighth Circuit seems to be saying that although this result can be arrived at indirectly with just as much effect or lack of effect upon outside shareholders or the public generally, the technical language of the Act precludes a direct acquisition

and contribution. The Supreme Court does not permit the alleged prophylactic effect attributed to Congress to be used as a grounds to charge Thomas with $95,000 he did not receive, and never could have received, under the asserted claim it was "profits realized". The Eighth Circuit uses the guise of maintaining the same prophylactic effect as a reason for charging Gamble-Skogmo with $100,000 it did not receive and never could have received, stating that the money constituted "profits realized".

DIVIDENDS

As to the award of dividends made by the majority of the Court of Appeals, the law seems to be completely unsettled. Prior to Judge Nordbye's decision in the Minnesota District Court awarding dividends on the 6,058 shares held by Gamble-Skogmo and not transferred, no case is known in which dividends were ever held to constitute "profits realized" and only one case, *Adler v. Klawans*, 267 F. 2d 840, appears to have discussed such a possibility. And yet in the majority of transactions in which 16 (b) is sought to be invoked, the question is bound to occur, because by far the majority of "issuers" do pay at least one dividend in any given six months period. So that the matter is important and some definitive guide lines are needed.

Brief consideration will show that confusion rather than clarity will result from any attempt to consider dividends a part of "profits realized". For instance, suppose a sale of stock under 16(b) followed by a purchase within six months at a lower price. Are the dividends paid to third parties on the stock during the period between the sale and the purchase "profit realized" on the grounds that the

sale and purchase can be "matched" for 16(b) purposes? Evidently the Eighth Circuit thinks so, for it has matched what it considers to be a "sale" and a "purchase" and blithely attached to this artificially constructed transaction dividends on 25,942 shares which were paid, not to the Fiduciary but to the Trust Fund.

The statute speaks of profit from purchase and sale. Ordinarily dividends would not be considered as profit "derived from" a purchase and sale, or trading activity. And the Eighth Circuit states that it believes the plain ordinary meaning of words of precise legal import is to govern. The Second Circuit in discussing the problem of dividends in *Adler v. Klawans,* 267 F. 2d 840, follows the pragmatic approach shown in its decisions on other phases of 16(b), and refusing to grant recovery for dividends suggests the following rule:

> "Situations may well arise relative to dividends where they are so inextricably connected with the 'purchase' and 'sale' of stock and possible manipulation by the insider for their own benefit and to the detriment of the corporation and the investing public as to compel the formulation of a rule on the subject under discussion in order to prevent the frustration of the statutory purpose described in the main part of this opinion."

Judge Nordbye in the Minnesota District Court was apparently the second judge to pass upon the question of dividends. He was the first judge to include them, holding (we believe erroneously) that the dividends on the 6,058 shares held by Gamble-Skogmo could be recovered under the reasoning of the *Adler* case, without specifying what facts he believed made that case applicable or what he believed the reasoning of the *Adler* case might be. And since the opin-

ion of Judge Nordbye two other cases, *Blau v. Lamb*, 242 F. Supp. 151, and *Marquette Cement Mfg. Co. v. Andreas*, 239 F. Supp. 962, have been decided. Both were in the District Court for the Southern District of New York. One case (*Blau v. Lamb, supra*) held one dividend recoverable and another not, because:

> "As to the June 30 cash dividend, I regard it as too incidental and not 'so inextricably connected' with defendant's purchase-and-sale transactions to be included in the amount recoverable. See Adler v. Klawans, 267 F. 2d 840, 849 (2d Cir. 1959). While it may be argued that, because the June 30, 1955 dividend was apparently the highest ever paid by Air-Way, it may have been part and parcel of an overall scheme of short-swing speculation, on balance, I am unpersuaded that such was the case. *Air-Way had been paying regular quarterly dividends at least since June, 1954*—before that date the record is silent—and declared dividends had fluctuated, a not unusual phenomenon in other companies depending upon usual criteria such as earnings, the state of the industry, management forecasts and the like" (Italics supplied).

The other case (*Marquette v. Andreas*) applying what appears to be a different view of the law held dividends recoverable. So that the state of the law is unsettled. This condition of uncertainty should not be permitted to continue in an area of such importance to the business community and investing public. Because the rules of 16(b) are always harsh, they at least should be definite and clear.

Whatever may be said or decided, however, about the question of dividends received by an "insider", the action of the Eighth Circuit in awarding judgment for dividends on 25,942 shares which the Trust Fund received raises a

far different problem. The majority again rejects the pragmatic approach to Section 16(b), and may fairly be said to treat the *Adler* case as establishing exceptions to some general rule which the court does not describe. By piling the fantasy of these dividends upon the fiction of a purchase and sale under 16(b), the court has reached a point where constitutional problems of due process exist. The application of 16(b) by the Eighth Circuit, at least to the problem of dividends, seems not only fundamentally unjust, but to be lacking in any rational and reasonable relationship to attaining the ends desired by Congress. The means of enforcing the law adopted by this Circuit go so far beyond any necessities of the case as to make the statute as construed an arbitrary exercise of government power.

CONCLUSION

Except to the extent contained in the opinion in *Blau v. Lehman*, 368 U. S. 403, the Supreme Court has never passed upon the application and meaning of 16(b). Originally such interpretation was probably not warranted. The number of cases arising under it was small and the fact situations were relatively simple. But litigation is increasing under it (at least five cases reported in the last six months, including this one, and in three different circuits) and the fact situations are becoming more complex. Moreover with the passage by Congress of the Securities Acts Amendments of 1964 (Public Law No. 88-467) the necessity of a clear and consistent rule in applying the section takes on a new dimension. The section will ultimately become applicable to every issuer engaged in interstate commerce, or whose securities are traded by the use of the mails or means of interstate commerce, having total assets in

excess of $1,000,000 and a class of equity securities held of record by 500 or more persons, so that a clear solution to these problems is definitely needed.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION BELOW

United States Court of Appeals
For The Eighth Circuit

No. 17,748

Western Auto Supply Company and Beneficial Finance Co.,

Appellants,

v.

Gamble-Skogmo, Inc.,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

[July 19, 1965.]

Before Van Oosterhout, Blackmun and Mehaffy, Circuit Judges.

Mehaffy, Circuit Judge.

This appeal is from a judgment of the United States District Court of Minnesota denying claims for recovery of alleged "short swing" profits from transactions in the common stock of Western Auto Supply Company of Mis-

souri under §16(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78 p (b) and § 78 aa.

Plaintiffs-appellants, Western Auto Supply Company and Beneficial Finance Co., both Delaware corporations, are hereafter referred to respectively as Western Delaware and Beneficial. Defendant-appellee, Gamble-Skogmo, Inc., a Delaware corporation, is hereafter referred to as Gamble-Skogmo. Western Auto Supply Company, formerly a Missouri corporation, is hereafter referred to as Western Missouri and the Gamble-Skogmo Profit-Sharing Stock Bonus Trust Fund is hereafter referred to as Trust Fund.

The case was submitted to the District Court upon a stipulation of facts which we summarize. On January 1, 1960, Gamble-Skogmo had been for over six months the owner of 1,256,044 shares of the only outstanding common stock of Western Missouri which constituted more than a 10% beneficial ownership in this stock under §16(a) of the Act, 15 U.S.C.A. §78 p (a). On January 15, 1960, the Executive Committee of Gamble-Skogmo unanimously adopted a resolution approving the Company's purchase of 32,000 additional shares of common stock of Western Missouri for the purpose of contributing so much as necessary to its Trust Fund in satisfaction of the Company's annual contribution to the fund for the year 1959. Pursuant to this resolution, on January 21, 1960, the 32,000 shares were purchased at $32.35 per share or a total cost of $1,035,200.00. The shares were paid for on January 27, 1960, were delivered by the brokerage firm to Gamble-Skogmo in certificates bearing street names, and were duly endorsed in blank.

On or about January 28, 1960, Gamble-Skogmo transferred 25,942 of these recently purchased shares to its

Trust Fund along with a check for $28.08, which combined represented the amount determined to constitute Gamble-Skogmo's contribution to its Trust Fund. Gamble-Skogmo was under no obligation to make this contribution in stock of Western Missouri or any other company.

On April 1, 1960, the Government brought a civil antitrust action against Gamble-Skogmo seeking divestiture of its holdings in Western Missouri. On July 18, 1960, a consent decree was entered in the antitrust case enjoining and restraining Gamble-Skogmo from owning shares in Western Missouri. Gamble-Skogmo at no time admitted the antitrust violations upon which the Government based its complaint. However, on July 11, 1960, less than six months after purchase of the 32,000 shares, Gamble-Skogmo sold its entire holding of 1,262,102 shares of Western Missouri common stock to Beneficial for $36.00 per share or a total sale price of $45,435,672.00.[1]

On October 27, 1961, Western Missouri merged with Beneficial, the latter emerging as the surviving corporation. After the merger was consummated, Beneficial transferred to Western Delaware all the assets formerly held by Western Missouri with exceptions not material here.

On December 13, 1961, the President of Western Delaware wrote Gamble-Skogmo demanding an accounting for profits, including dividends, which the latter received as an "insider" from the "short swing sale" of 32,000 shares of Western Missouri on July 11, 1960. Gamble-Skogmo responded by forwarding a check to Western Delaware for $22,111.70, being the difference in the sale price over cost

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[1]This holding represented 1,256,044 shares owned on January 1, 1960, *plus* the 32,000 shares purchased *less* the 25,942 shares transferred to Trust Fund.

on 6,058 shares, but refused payment on the 25,942 shares which it had transferred to its Trust Fund.

In its decision reported in 231 F. Supp. 456, the District Court held that plaintiffs were entitled to recover the sum of $4,240.60 which is the profit received by way of dividends on the 6,058 shares together with the interest at the legal rate from June 1, 1960, to the date of judgment, April 19, 1964. The Court held against Gamble-Skogmo on its counterclaim for return of the $22,111.70 which it had paid voluntarily to Western Delaware on December 18, 1961. Gamble-Skogmo had alleged that this payment was made under a mistake of law and fact "and as a practical solution of an alleged claim" of Western Delaware.[2]

This appeal presents issues as to Western Delaware and Beneficial's capacity to bring this action; the existence of a purchase and a sale of the 25,942 shares of Western Missouri within the meaning of the statute; the existence of a profit on the purchase and sale of these shares; and the inclusion of dividends and interest in a recoverable judgment.

Capacity to Sue. At the outset the question is posed as to whether merger of the issuing corporation, Western Missouri, with a surviving corporation which subsequently assigns all the interests acquired in the issuer to a third corporation, properly vests the successor, Beneficial, and its assignee, Western Delaware, with the statutory right of the issuer to bring an action under §16(b)?

In answering this proposition affirmatively, the District Court relied principally upon the merger statute of Mis-

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[2]Western Delaware brought this action and Beneficial intervened as a co-plaintiff. On appeal, the Securities and Exchange Commission, with leave of this Court, favored us with its *amicus curiae* brief.

souri, the State where the issuing corporation was incorporated. This statute simply operates to transfer to the successor corporation without further act or deed all rights, privileges, interests, property and liabilities, including choses in action which formerly belonged or were chargeable to the merged corporation. See Mo. Rev. Stat. §351.450 (1959).[3] The District Court also reasoned that since the legislative purpose of §16(b) was intended to protect property rights of the investing public as well as those of the issuing corporation, §16(b) must be broadly construed in reaching the decision that the chose in action here survived and was properly assigned.

We note that Gamble-Skogmo is in the anomalous position of having failed to cross-appeal from the District Court's finding that Beneficial and Western Delaware were entitled under §16(b) to the profits on the 6,058 shares not conveyed to the trust, but retained in Gamble-Skogmo's corporate portfolio. Despite this apparent concession that not only the issuer, Western Missouri, but also its successor and assignee, Beneficial and Western Delaware, were proper parties to maintain a §16(b) action for recovery of the non-trust fund profits, Gamble-Skogmo inconsistently argues that these appellants were incapable under the statute of suing for the profits on the 25,942 shares transferred to the Trust Fund. Even though we have grave reservations with respect to whether Gamble-Skogmo has not thereby already waived its right to challenge Beneficial and Western Delaware's capacity to bring this action, the issue is one of significant first impression and worthy of discussion.

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[3]Delaware, the state of incorporation of Beneficial, the successor, has a similar statute. Del. Code Ann. tit. 8, §259 (Supp. 1964).

By its express language, §16(b) gives a right of action at law or in equity in any court of competent jurisdiction to recover profits gained by an insider in a short swing purchase and sale of stock to the issuer or the owner of any security of the issuer in its behalf.[4] Section 3(a) (8) defines "issuer" as "any person who issues or proposes to issue any security. * * *" *15 U.S.C.A.* §78c(a) (8). Gamble-Skogmo contends that the statutes' failure to create a right of action for heirs, successors or assigns of the named parties in interest indicates legislative intent to exclude their capacity to sue. And that the applicable federal common law does not recognize survival or assignment of this statutory right which is personal and expires when the party on whom it was conferred ceases to exist.

Gamble-Skogmo cites *United States v. Klein*, 153 F. 2d

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[4]Sec. 16(b), 15 U.S.C.A. §78 p (b), provides:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transactions where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

55 (8th Cir. 1946) as authority for its argument against looking to the general common law to determine whether a cause of action under §16(b) can survive. This is a misinterpretation of our rationale in *Klein*. That case involved federal statutes governing the medical and compensation benefits covering employees injured while serving in the old Civilian Conservation Corps. We held there that these statutory provisions furnished the Government its exclusive remedy for obtaining an assignment of a cause of action in order to recoup from the third party tort-feasor the benefits paid an injured CCC employee and for that reason no resort could be had to the common law of agency of the jurisdiction where the injury occurred to establish the Government's capacity to sue.

The view which has been embraced by the weight of federal authority is that resort must be made to the federal and general common law when the federal statute is silent with respect to the question of survivability to determine if the cause of action is of a nature or substance which has traditionally survived. *Pierce v. Allen B. Du Mont Laboratories, Inc.*, 297 F. 2d 323, 324 (3rd Cir. 1961), cert. denied 371 U. S. 814 (1962), reh. denied 371 U. S. 917 (1962), and cases there cited: *Sullivan v. Associated Billposters and Distributors*, 6 F. 2d 1000 (2nd Cir. 1925); *Mills v. Sarjem Corp.*, 133 F. Supp. 753 (N. J. 1955).

An award for profits made by an insider in a short swing transaction under §16(b) has been characterized without exception as non-penal, remedial compensation to protect property rights of the corporation and its investors for breach of the insider's fiduciary relationship. *Adler v. Klawans*, 267 F. 2d 840 (2nd Cir. 1959); *Smo-*

lowe v. Delendo Corp., 136 F. 2d 231 (2nd Cir. 1943), cert. denied 320 U. S. 751 (1943); *Perfect Photo, Inc. v. Grabb*, 205 F. Supp. 569 (E.D. Pa. 1962); *Epstein v. Shindler*, 200 F. Supp. 836 (S.D. N.Y. 1961).

At common law practically all actions arising *ex contractu* survived. However, a cause of action sounding in tort in the nature of a personal wrong abated when the injured party expired, while a tortious claim for protection of property rights survived. *Barnes Coal Corp. v. Retail Coal Merchants Ass'n.*, 128 F. 2d 645, 649 (4th Cir. 1942); *Sullivan v. Associated Billposters and Distributors, supra*, at 1004. Accordingly, this cause of action in tort which emanates from breach of the statutory duty imposed on an insider and is designed to safeguard property rights survived the absorption of the issuing corporation and was properly vested in Beneficial, the successor corporation.

Furthermore the District Court did not erroneously rely on the merger statute of Missouri as added support for its finding that the successor corporation inherited the chose in action by operation of law. Such statutes of Missouri and Delaware serve to codify the rule at common law which recognizes that a chose in action to enforce a property right upon merger vests in the successor corporation and no right of action remains in the merging corporation. See *e.g., Akwell v. Eiger*, 141 F. Supp. 19, 21 (S.D. N.Y. 1956); *19 C.J.S.*, Corporations, §1628 at 1390.

We think the District Court was equally correct in its finding that given a surviving chose in action for protection of property rights and a valid merger agreement, Western Delaware could acquire a capacity along with Beneficial to sue Gamble-Skogmo by virtue of an effective

assignment. In *Spiller v. Atchison T. & S. F. Ry.*, 253 U. S. 117, 135 (1920), the Supreme Court was faced with the similar problem of the assignability of a cause of action under the Interstate Commerce Act when the particular statute violated made no provision for assignment of claims. A unanimous court concluded that where the statute provided for compensation of a claim for damages sustained through the exaction of unreasonable charges for the carriage of freight, the claim was compensatory, not penal, in nature, and as a property right must be regarded as assignable at law in the absence of an express legislative intent to the contrary. Such a rule of statutory interpretation should apply with analogous vigor to the pertinent section of the Securities Exchange Act which we have been asked to interpret.

Construction of §16(b). Our interpretation of §16(b) compels disagreement with the trial court's ruling insofar as it excludes from the Act's interdiction the number of shares of Western Missouri transferred by Gamble-Skogmo to its Trust Fund. We base our conclusion upon the textual language of the Act, the abuses the Act was designed to prevent and what we consider to be well reasoned case law interpreting the Act.

It is forcefully argued that because Gamble-Skogmo purchased the 32,000 shares for the avowed purpose of contributing so much thereof as was necessary to discharge its obligation to the Trust Fund and did, in fact, transfer 25,942 shares to the Trust Fund, there was no purchase, sale or profit to Gamble-Skogmo within the intendment of §16(b) as to those shares so transferred. Nevertheless, the authorities construing §16(b) require the forfeiture of profits by an insider irrespective of his good faith or intentions

which motivate his trading. *Blau v. Max Factor & Co.*, 342 F. 2d 304, 307 (9th Cir. 1965); *Rheem Mfg. Co. v. Rheem*, 295 F. 2d 473, 475 (9th Cir. 1961); *B. T. Babbit, Inc. v. Lachner*, 332 F. 2d 255, 257 (2nd Cir. 1964); *Blau v. Lehman*, 286 F. 2d 786, 791 (2nd Cir. 1960), aff'd. 368 U. S. 403 (1962); *Walet v. Jefferson Sulphur Co.*, 202 F. 2d 433 (2nd Cir. 1953); *Gratz v. Claughton*, 187 F. 2d 46, 51 (2nd Cir. 1951); *Smolowe v. Delendo Corp., supra.*

Section 16(b) applies to an insider upon "*any* profit" realized from "*any* purchase and sale"—within any period of less than six months (emphasis supplied).

The Securities Act defines "purchase" and "sale" as follows:

> "(13) The terms 'buy' and 'purchase' each include *any* contract to buy, purchase, or otherwise acquire.
> "(14) The terms 'sale' and 'sell' each include *any* contract to sell or otherwise dispose of."
> *15 U.S.C.A.* §78c (13), (14) (emphasis supplied).

It is obvious from the stipulation of facts that Gambleskogmo, concededly an "insider", bought, sold and profited from its transaction in Western Missouri stock within the prohibited six month period if the literal language of the Act is given plain and ordinary meaning.[5]

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[5]We said in *Sternberg Dredging Co. v. Walling*, 158 F. 2d 678, 681 (8th Cir. 1947):

"In the interpretation of a statute its words are to be taken according to the meaning given them in common usage, unless to do so produces an absurd result or one which defeats the purpose for which the Act was passed. *United States v. American Trucking Association, supra*, 310 U. S. 534, at page 543, 60 S. Ct. 1059, 84 L. Ed. 1345."

See also *Labor Board v. Coca Cola Bot. Co.*, 350 U. S. 264 (1956); *Browder v. United States*, 312 U. S. 335 (1941); *United States v. Stewart*, 311 U. S. 60 (1940); *Helvering v. Rebsamen Motors*, 128 F. 2d 584 (8th Cir. 1942).

Gamble-Skogmo insists that because the stock was bought to fulfill an obligation to the Trust Fund that the word "purchase", or, as appellee refers to the transaction "acquisition", should not be given its ordinary meaning. Gamble-Skogmo offered no explanation for discharging its obligation to the Trust Fund in newly acquired Western Missouri stock, rather than with cash, or by dipping into the huge reserve of more than one million shares it had owned for approximately two years. The Executive Committee of Gamble-Skogmo voluntarily decided to acquire additional stock to be utilized in satisfaction of the Trust Fund obligation. Gamble-Skogmo elected to become a statutory fiduciary by owning a more than 10% interest in Western Missouri stock. Its voluntary assumption of loyalty subjects it to the disciplinary effect of §16(b), regardless of the legitimate purpose for which the shares were destined.

Gamble-Skogmo next asserts that the sale of its entire holding of 1,262,102 shares on July 11, 1960, was not a "sale" which would subject the 25,942 shares transferred to Trust Fund to the application of §16(b). It argues that the sale was compelled by the Government's antitrust action. It nevertheless voluntarily sold all Western Missouri stock standing in its name, and entered into a consent decree with the Government. The profitable sales price of some forty million dollars might have been a factor motivating the sale at that particular time if, as Gamble-Skogmo contends, it was not guilty of violating the antitrust laws. In any event, the mere pendency of an action would not weigh to justify giving the term "sale" any other than its ordinary meaning. More than a century ago, the Supreme Court defined "sale" and characterized it as "* * *

a word of precise legal import, both at law and in equity. It means at all times a contract between the parties, to give and to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought or sold." *Williamson v. Berry*, 49 U. S. 495, 543 (1850).

The issue is also raised that no one actually profited from the purchase of the shares transferred to the Trust Fund. True, these identical shares were not sold, but the segregation of shares is not permissible under §16(b). On the contrary, a proper construction of §16(b) requires that purchases and sales be matched arbitrarily so as to disgorge the insider of a maximum profit under a rule of lowest-price-in and highest-price-out within six months, regardless of any intent with respect to a particular purchase or sale, and without limitation to a specific stock certificate. This rule was first enunciated in *Smolowe v. Delendo Corp.*, *supra*, at 237. Shares of stock are fungible and each certificate denotes identical rights. *Gratz v. Claughton*, *supra*, at 51; Rubin & Feldman, *Statutory Inhibitions upon Unfair Use of Corporate Information by Insiders*, 95 U. Pa. L. Rev. 468 (1947). The segregation or matching of stock certificates cannot be countenanced without scuttling the remedial effect of §16(b). To do otherwise would open wide the door for easy evasion of the purpose of the Act which the court in the *Gratz* case, *supra*, at 51, indicated was to treat short swing transactions in shares of stock indiscriminately as "* * * sales and purchases, or purchases and sales, of gallons of oil in a single tank, or of bushels of wheat in a single bin, * * * the ascertainment of the particular shares bought or sold must be wholly irrelevant."

A review of the legislative history points up the abuses the Act was designed to overcome. Congress conducted ex-

tensive hearings which brought to light the vicious practices by insiders in their trading activities. In wrestling with the problem, Congress was concerned with the effect of the insiders' practices upon outside shareholders and the public generally.[6] Congress initially considered criminal sanctions but concluded that the complete elimination of profits regardless of the wrongdoer's intent would effectively eliminate short swing trading by insiders. See *95 U. Pa. L. Rev., op cit. supra.*

The Supreme Court in *Blau v. Lehman*, 368 U. S. 403, 414 (1962), speaks of the "prophylactic" effect Congress clearly prescribed in §16(b). Other cases cited in this opinion refer to §16(b) as being "remedial", "broadly remedial", "thoroughgoing", and "absolute" in strictly construing the statute against the insider in order to effectuate its wholesome purpose. We observed in *Creswell-Keith v. Willingham*, 264 F. 2d 76, 80 (8th Cir. 1959):

> "Moreover, courts having occasion to interpret the Securities Act have generally held that the Act should be liberally construed to carry out the express legislative policy."

Section 16(b) must be construed so as to not dilute its vitality. We cannot have one rule for insiders with good intentions and another for those who would flagrantly abuse their trust. The burdens of the Act must fall on all violations with equal weight.[7]

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[6]See Hearing before House Committee on Interstate and Foreign Commerce on H.R. 7852 and H.R. 8720, 73rd Cong., 2nd Sess. (1934) 85; Hearing before Senate Committee on Banking and Currency on S. Res. 84, 72nd Cong., and S. Res. 56 and S. Res. 97, 73rd Cong., 1st Sess. (1934) 6557-6559.

[7]Gamble-Skogmo's reliance on *Shaw v. Dreyfus*, 172 F. 2d 140 (2nd Cir. 1949), cert. denied 337 U. S. 907 (1949), and *Truncale v. Blum-*

Dividends. Lastly, Western Delaware and Beneficial contend that they are entitled to dividends and interest on all 32,000 shares of Western Missouri stock here in question. We agree.

The District Court allowed recovery of dividends on 6,058 shares but denied them on the 25,942 shares transferred to Trust Fund. This holding was, of course, in conformity with the District Court's decision to match the stock certificates. However, as previously stated, we think the court erred in its interpretation and application of the *Smolowe* and *Gratz* decisions.

The 32,000 shares of stock purchased on January 21, 1960 lost, on that day, all individual identity with respect to certificate numbers and a subsequent sale of any number of shares up to and including 32,000, within six months, resulting in a "profit" subjects the "insider" to liability under §16(b). *Gratz v. Claughton, supra; Smolowe v. Delendo Corp., supra; Walet v. Jefferson Lake Sulphur Co., supra.*

Apparently, the question of including dividends in the "profit realized" from the "sale and purchase" has arisen infrequently. In *Adler v. Klawans, supra,* dividends were declared in three different years with each involving a different factual relationship to the defendant. The first divi-

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berg, 80 F. Supp. 387 (S.D. N.Y. 1948), the so-called "gift cases", is, we think, misplaced. Both of these cases dealt with bona fide gifts. Neither involved a sale within six months. Since there was no subsequent sale within the proscribed period, the transactions in the gift cases could not fall within the ambit of §16(b). The patent difference here is that there was a subsequent sale by Gamble-Skogmo in July of 1960 after the transfer to the Trust Fund within the proscribed six month period. We also have noted the reference to the ethical position of Beneficial in seeking to recover, in effect, a part of the purchase price it willingly paid for the stock. The punctilios of the parties are not an issue here.

dend was declared before defendant was a shareholder and the second declared before he was elected a director, although he was by this time a shareholder of less than 10%. In neither instance was defendant an "insider" in the sense of having an opportunity to misuse private corporate information unavailable to "outside" shareholders. When the third dividend was declared, defendant was a director but in the words of the court, *supra* at 849, the "shares on which the * * * dividends were declared and paid * * * were sold * * * at a loss * * * which was greater than the amount of the dividends." The court excluded this category because no profits were realized by defendant while trading as an insider.[8]

In the case at bar, Gamble-Skogmo was already an "insider" when the dividends were declared and paid. Its status remained unchanged when the shares were ultimately sold within six months. The 32,000 shares were sold at a profit with the dividend simply increasing this gain. None of the *Adler* "situations" pertaining to dividends are present here.

Interest. An allowance of interest is not mandatory in cases of this kind. *Magider v. Continental Can Co.*, 231 F. 2d 843 (2nd Cir. 1956), cert. denied 351 U. S. 972 (1956). The trial court may in its discretion make such awards depending upon the equities of the case. *Blau v. Lehman*, 368 U. S. 403, 414 (1962). There is at least one decision holding that the defendant show some "overriding inequity" in allowing interest as a full accounting ordinarily includes such awards. *Perfect Photo, Inc. v. Grabb, supra* at 573-574. The record does not reveal evidence of such in-

[8]Accord, *Marquette Cement Mfg. Co. v. Andreas*, 239 F. Supp. 962, 968 (S.D. N.Y. 1965).

equities to warrant reversal of the trial court on the basis that it abused its discretion in granting interest.

Interest was allowed on the dividends of 6,058 shares from June 1, or the payment date of those dividends. At this time, however, Gamble-Skogmo was not in violation of §16(b) as the "sale", within six months of purchase, was yet to be transacted on July 11. We think if interest is to be allowed at all, it should not begin to accrue until liability matures. Thus, such an allowance would not run from the date the dividends were paid but from the date of sale. *Stella v. Graham-Paige Motors Corp.*, 232 F. 2d 299, 302 (2nd Cir. 1956), cert. denied 352 U. S. 831 (1956); *Magider v. Continental Can Co., supra,* at 848; *Blau v. Mission Corp.*, 212 F. 2d 77, 82 (2nd Cir. 1954), cert. denied 347 U. S. 1016 (1954).

Reversed and remanded for proceedings not inconsistent with this opinion.

Van Oosterhout, Circuit Judge, dissenting in part.

I concur in the view of the court that plaintiffs have capacity to bring this suit. I agree with the court's opinion to the extent that it holds plaintiffs are entitled to recover under §16(b) for the profits realized on the 6,058 shares of Western Missouri stock acquired in March 1960 which were not turned over to the trust fund, and I also agree that plaintiffs are entitled to the 70¢ per share in dividends paid on the 6,058 shares.

I dissent from the portion of the opinion which in disagreement with the trial court determines that the 25,942 shares of stock acquired in March 1960 and turned over to the trust fund were purchases within the meaning of §16(b). In *Blau v. Max Factor & Co.*, 9 Cir., 342 F. 2d 304, 306-07, the Court states:

> "The statutory definitions of 'purchase' and 'sale' are exceedingly general. They are given specificity by measuring questioned transactions against the purpose of section 16(b). Thus, a transaction is held to be a 'purchase' within section 16(b) 'if in any way it lends itself to the accomplishment of what the statute is designed to prevent.' *Blau v. Lehman,* 286 F. 2d 786, 792 (2d Cir. 1960), aff'd 368 U. S. 403, 82 S. Ct. 451, 7 L. Ed. 2d 403 (1962). See also *Park & Tilford v. Schulte,* 160 F. 2d 984 (2d Cir. 1947). On the other hand, to avoid purposeless harshness, a transaction is held not to be a section 16(b) 'purchase' if it 'was not one that could have lent itself to the practices which Section 16(b) was enacted to prevent.' *Ferraiolo v. Newman,* 259 F. 2d 342, 346 (6th Cir. 1958). See also *Roberts v. Eaton,* 212 F. 2d 82, 85-86 (2d Cir. 1954); *Shaw v. Dreyfus,* 172 F. 2d 140, 142 (2nd Cir. 1949). Cf. *Blau v. Mission Corp.,* 212 F. 2d 77, 80 (2d Cir. 1954) ('sale'); *Falco v. Donner Foundation,* 208 F. 2d 600, 604, 40 A.L.R. 2d 1340 (2d Cir. 1953)."

I agree with the foregoing statement.

For the reasons pointed out by Judge Nordbye in his opinion reported at 231 F. Supp. 456, the facts in our present case do not present a situation which lends itself to the accomplishment of an objective §16(b) is designed to prevent.

Judge Nordbye found: "The undeniable fact is that the 25,942 shares which passed into the holdings of the Trust Fund were simply handled by Gamble-Skogmo as a conduit for the purpose of enabling the Trust Fund to place among its assets this number of shares which had been purchased. * * *" 231 F. Supp. 456, 461. Upon the basis of such finding, Judge Nordbye states:

"The purpose of the Act is to provide that an insider engaging in so-called short swing trading must disgorge any profits he may have made when the stock was bought and sold during a six-month period. Under the circumstances here, the Court is not required to adopt some fiction in order to put teeth into the law. This transfer of stock by an insider to the Trust Fund is not an example of short swing trading. The Court will not adopt a construction of the statute which would simply result in a windfall to these plaintiffs and require the defendant to account for alleged profits on a stock transaction which did not inure to it." 231 F. Supp. 456, 461.

The court's finding is supported by substantial evidence.[1]

The trust agreement authorizes payment of contributions due in the form of Western Missouri stock. On January 15, 1960, the Gamble-Skogmo executive committee, as reflected by its minutes, approved the purchase of 32,000 shares of Western Missouri stock "for the purpose of contributing the same, or so many shares thereof as are necessary, to the Trustees of the Company's Profit-Sharing-Stock Bonus Trust Fund in satisfaction of the Company's contribution to that trust fund for 1959."

It is stipulated that at the time the executive committee

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[1]The Securities and Exchange Commission in its amicus curiae brief states:

"Judge Nordbye's conclusion that appellee acted as a 'conduit' for the purpose of making the purchase for the trust fund appears to be without support in the record. The fact of appellee's purchase of an additional 6,058 shares at a time when the amount of its outstanding obligation was determined suggests doubt as to the validity of the determination that it acted merely as a 'conduit.' If, however, appellee had, in fact, confined its activities in connection with the questioned transactions to acting solely as agent for the trust fund, the trial court's result might have been reached without endangering the principles which we feel must not be impaired."

took the foregoing action, 32,000 shares was the best estimate available as to the number of shares needed to cover the contribution. On January 21, the 32,000 shares were purchased through a broker. They were paid for and received in street names endorsed in blank on January 27, 1960. The exact amount of the contribution was not definitely ascertained until sometime between January 21 and January 28. On January 28, 1960, 25,942 shares of the 32,000 shares just acquired were transferred to the trust fund in satisfaction of the 1959 contribution due. It is well-established that courts look to the substance as well as to the form of transactions. See *Rheem Mfg. Co. v. Rheem*, 9 Cir. 295 F. 2d 473, 476.

In my view, Judge Nordbye very clearly points out in his reported decision the reasons why the transaction here involved in no way defeats the purpose which §16(b) was designed to prevent.

I do not question the validity of the decisions relied upon by the majority as applied to the facts of such cases. A number of such cases point to the rule as being a harsh one but one that is required to effect the purposes of the Act. Under the facts of this case, no strained construction of the word "purchase" is needed to prevent realization of insider profits. I would affirm upon the basis of Judge Nordbye's well-reasoned and supported opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Judgment Below
United States Court of Appeals
For the Eighth Circuit

No. 17748. September Term, 1964.

Western Auto Supply Company and Beneficial Finance Co.,

Appellants,

vs.

Gamble-Skogmo, Inc.

Appeal from the United States District Court for the District of Minnesota

---

This Cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, Is it now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause, be, and the same is hereby, reversed with costs; and that Western Auto Supply Company and Beneficial Finance Co., have and recover against Gamble-Skogmo, Inc., the sum of One Thousand Forty-seven and 25/100 ($1,047.25) Dollars for their costs in this behalf expended and have execution therefor.

And it is further Ordered and Adjudged by this Court that this cause be, and the same is hereby remanded to the

said District Court for proceedings not inconsistent with the opinion of this Court this day filed herein.

July 19, 1965

APPENDIX C

Order denying Petition of Appellee for a Rehearing United States Court of Appeals For the Eighth Circuit

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No. 17748

Western Auto Supply Company and Beneficial Finance Co.,

Appellants,

vs.

Gamble-Skogmo, Inc.

Appeal from the United States District Court for the District of Minnesota

---

Petition of appellee for rehearing in this cause having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.

August 13, 1965.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 735

GAMBLE-SKOGMO, INC.

Petitioner

vs.

WESTERN AUTO SUPPLY COMPANY AND BENEFICIAL FINANCE CO.

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Secondary Authorities:

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2 Loss, Securities Regulation 1063-64 (2d ed. 1961) 6, 12
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In the
Supreme Court of the United States

OCTOBER TERM, 1965

No. ————

GAMBLE-SKOGMO, INC.

Petitioner

VS.

WESTERN AUTO SUPPLY COMPANY AND BENEFICIAL FINANCE CO.

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT

The facts essential to the consideration of this petition for writ of certiorari are accurately and succinctly stated in the parties' Stipulation of Facts (R. pp. 60, 62-66) and in the initial portion of the Memorandum Decision of the District Court (R. pp. 164-166). The latter reads, in pertinent part, as follows:

> "As of January 1, 1960, the defendant, Gamble-Skogmo, Inc., was the beneficial owner of 1,256,044 shares of common stock issued by Western Auto Supply Company, a former Missouri corporation hereaft-

er called Western Missouri. From January 1, 1960, to July 11, 1960, these holdings represented more than ten per cent of Western Missouri's only outstanding class of common stock. Prior to January 15, 1960, there was due and owing from Gamble-Skogmo to its Employees Profit Sharing-Stock Bonus Trust Fund, hereafter called the Trust Fund, the sum of $839,-251.78. On January 15, 1960, the Gamble-Skogmo Executive Committee approved the purchase of 32,-000 shares of Western Missouri common stock for the purpose of contributing them, or as much thereof as would be necessary, to the Trust Fund in order to satisfy Gamble-Skogmo's 1959 obligation. On January 21, 1960, Gamble-Skogmo purchased 32,000 shares of Western Missouri common stock at $32.35 per share for $1,035,200 through Allen and Company, an investment securities dealer. On January 27, 1960, Allen and Company delivered to Gamble-Skogmo the required number of share certificates of Western Missouri bearing street names (not designated by Gamble-Skogmo) and endorsed in blank. Following the receipt of the stock, on January 28, 1960, Gamble-Skogmo caused 25,942 shares of this stock to be transferred to a nominee for the corporate trustee of the Trust Fund. In that the stock at the price purchased totaled $839,223.70, and the indebtedness to the Trust Fund was $839,251.78, a check for $28.08 was delivered to the Trust Fund trustee by Gamble-Skogmo so that the total amount due of $839,251.78 was obtained thereby. The remaining 6,058 shares of the 32,000 shares of Western Missouri thus purchased was then transferred to Gamble-Skogmo on the stock records of Western Missouri. It should be mentioned that Gamble-Skogmo was not required to make its contribution to the Trust Fund in Western Missouri stock or any other stock, but it merely chose this method to make this voluntary contribution for the year 1959.

With the 6,058 shares added to the 1,256,044 shares, Gamble-Skogmo owned 1,262,102 shares of Western Missouri stock on January 31, 1960. All of these shares were sold to the Beneficial Finance Co. on July 11, 1960, for a price of $36 per share, totaling $45,435,672. In the interim from January 31, 1960, to July 11, 1960, Gamble-Skogmo had received dividends on its Western Missouri stock totaling 70 cents per share. The stipulation of facts states that on July 28, 1961, Beneficial and Western Missouri agreed to merge into the former company. The merger was completed on October 27, 1961. On the same date, Beneficial sold all its right, title and interest in Western Missouri assets to Western Auto Supply Company, a Delaware corporation, hereafter referred to as Western Delaware."

The relevant facts set forth in the Stipulation of Facts are fairly summarized in the foregoing statement of the District Court. Both decisions below rested squarely on these facts and no others are necessary to the disposition of this petition.

ARGUMENT

The correct resolution of the issues presented to the courts below in this case turned solely on the stipulated facts. The law applicable to those facts is settled and routine. The decision of the Court of Appeals for the Eighth Circuit adheres precisely to the rules of statutory interpretation of Section 16(b) established by the leading cases under that provision, whereas the decision of the District Court constituted a deviation from those rules. Moreover, the Eighth Circuit decision lends support to the policy of the statute, while the decision of the District Court threat-

ened seriously to undermine it. In short, there is no justification for review of the Eighth Circuit decision by this Court.

I.

All Requisites for Liability under Section 16(b) Are Here Present

There are five, and only five, elements relevant to a determination of liability under Section 16(b): (1) a purchase, and (2) a sale, (3) of an equity security (other than an exempted security), (4) within a period of less than six months, (5) by a 10% beneficial owner. When these five elements have been established, the profit realized on the purchase and sale is the measure of recovery.

The petition for writ of certiorari disputes the correctness of the finding of liability below primarily on the grounds that a "purchase" and a "sale" within the meaning of Section 16(b) were not established. Its principal support for this statement appears to be Judge Nordbye's characterization of the transaction as one in which the shares which passed into the Trust Fund "were simply handled by Gamble-Skogmo as a conduit" (R. p. 173), which statement it characterizes as a finding of fact (Petition p. 8).

The fallacy in this line of reasoning is, of course, that Judge Nordbye's characterization of Gamble-Skogmo as a "conduit" cannot be considered a finding of fact. It is nothing more than the expression of a conclusion, which, as the Securities and Exchange Commission stated in its amicus brief in the Court of Appeals, "appears to be without support in the record" (Petition pp. 9, A-18 n. 1). Given the stipulated facts, Gamble-Skogmo can only be called a "conduit" in the simple, descriptive sense that it was an

entity through whose hands the shares passed. In this sense, the "conduit" concept is of no utility in determining whether a "purchase" and a "sale" occurred.

That a "purchase" and a "sale" actually did occur is conclusively established by the Stipulation of Facts of the parties (R. pp. 60, 62-66) as summarized in the District Court's Memorandum Decision, quoted at length in the Statement, *supra*. As the District Court found, on January 21, 1960, Gamble-Skogmo "purchased" 32,000 shares of Western Missouri common stock. On July 11, 1960, Gamble-Skogmo "sold" 1,262,102 shares of Western Missouri common stock to Beneficial Finance Co. These facts alone suffice to establish an unlawful purchase and sale within a period of six months.

Petitioner's sole argument to the contrary derives from the fact that Gamble-Skogmo caused 25,942 of the 32,000 recently purchased shares to be transferred, upon receipt, to the Trust Fund. Petitioner's theory apparently is that these 25,942 shares were purchased only for the Trust Fund and were therefore not among the shares sold in July. But this argument requires resort to the thoroughly discredited theory that a finding of violation of the statute depends upon a finding of a purchase and a sale of identical shares within six months. The ascertainment of the particular shares bought and sold is wholly irrelevant. Rather, Section 16(b) is satisfied only by a comparison of the lowest purchase price and the highest sale price at which *any* of the group of shares in question were bought and sold during any period of less than six months. See, *e.g., Gratz v. Claughton*, 187 F. 2d 46 (2d Cir.), *cert. den.*, 341 U. S. 920 (1951); *Smolowe v. Delendo Corp.*, 136 F. 2d 231 (2d Cir.), *cert. den.*, 320 U. S. 751 (1943); *Heli-*

Coil Corp. v. Webster, 222 F. Supp. 831 (D.N.J. 1963); *Steinberg v. Sharpe,* 95 F. Supp. 32 (S.D.N.Y. 1950), *aff'd on opinion below,* 190 F. 2d 82 (2d Cir. 1951); 2 Loss, SECURITIES REGULATION 1063 (2d ed. 1961). Since shares of stock are fungible, a 10% beneficial owner is not entitled to match share certificates to determine whether a profit has been realized under the terms of Section 16(b). See, *e.g., Walet v. Jefferson Lake Sulphur Co.,* 202 F. 2d 433 (5th Cir.), *cert. den.* 346 U. S. 820 (1953); Cook & Feldman, *Insider Trading Under the Securities Exchange Act,* 66 HARV. L. REV. 612, 613 (1953); Rubin & Feldman, *Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders,* 95 U. PA. L. REV. 468, 481 (1947).

Alternatively, petitioner may be arguing that Gamble-Skogmo never really purchased or sold the Western Missouri shares because it acquired them only as agent for the Trust Fund. But this simply was not the fact. As the District Court stated, "It should be mentioned that Gamble-Skogmo was not required to make its contribution to the Trust Fund in Western Missouri stock or any other stock, but it merely chose this method to make this voluntary contribution for the year 1959" (R. p. 165). Gamble-Skogmo alone made the decision to satisfy its obligation by contributing newly purchased shares rather than cash or shares which it already owned. The Trust Fund exercised no direction or control whatever over the process of acquisition and contribution.

Respondents emphasize that they do not here contend that a profit was realized by petitioner on the purchase and transfer to the Trust Fund. The profit which respondents are entitled to recover is measurable by the difference between the January 21, 1960, purchase and the July 11,

1960, sale. Contrary to petitioner's argument, petitioner not only realized this profit within the meaning of Section 16 (b), *but did in fact profit from the transactions here under consideration.* If petitioner had contributed 25,942 Western Missouri shares to the Trust Fund without first purchasing additional shares, it would have owned 25,942 fewer shares on July 11, 1960, and would have received a correspondingly smaller profit on the sale on that date. Thus, the profit here ascribed to Gamble-Skogmo was a profit *in fact* as well as a profit in theory.

Under the facts of the case, Gamble-Skogmo purchased Western Missouri common stock on January 21, 1960, at $3.65 per share less than the price at which it sold Western Missouri common stock on July 11, 1960. Thus, a short-swing profit was realized. It is clear that the merits of the case were correctly decided by the Court of Appeals, and the Securities and Exchange Commission concurs in this conclusion (see Petition p. 8).

II.

There Is No Conflict with Other Decisions

Petitioner strives mightily to develop the theory that there is some sort of conflict between the decision of the Court of Appeals on the one hand and decisions of this Court and other federal courts on the other. In fact, no such conflict exists, and petitioner has pointed to none.

Petitioner relies, first, on two decisions of this Court, *United Gas Improvement Co. v. Continental Oil Co.,* 14 L. Ed. 2d 466 (1965), and *Blau v. Lehman,* 368 U. S. 403 (1962). The former case deals with the Natural Gas Act, and has nothing whatever to do with Section 16(b) of the Securities Exchange Act of 1934. And, while the

Blau decision did arise under Section 16(b), it had nothing whatever to do with the interpretation of the terms "purchase" and "sale." In *Blau* the question was whether a defendant partnership was or was not an "insider" subject to the sanctions of Section 16(b)—a question obviously unlike and unrelated to any issue presented here. Moreover, the argument for liability advanced in *Blau* was demonstrably rejected by the Congress at the time of enactment of the statute; no such consideration is applicable to the present case.

Petitioner contends that the *Blau* case somehow supports the thesis that no "profit" was "realized" by it due to the transfer of shares to the Trust Fund. The fallacy of this argument is that it distorts *Blau* into a precedent for matching the purchase and sale of identical share certificates in determining liability under Section 16(b). Of course, *Blau* stands for no such principle. It is immaterial that Gamble-Skogmo did not have in its possession at the time of its July 11, 1960, sale the specific stock certificates representing 25,942 of the shares it purchased on January 21, 1960, for liability follows as a necessary consequence of the fact that Gamble-Skogmo purchased Western Missouri common shares on January 21, 1960, and sold Western Missouri common shares at a higher price on July 11, 1960. See, *e.g., Gratz v. Claughton, supra; Smolowe v. Delendo Corp., supra.*

Nor does any of petitioner's references to cases in lower federal courts (Petition p. 12) point to any conflict with the decision below. All of those cases (save *Blau v. Lehman, supra,* already discussed) deal with the problem of conversion of one class of security into another, a problem not in issue here. Petitioner erroneously argues that the de-

cision of the Court of Appeals is in conflict with the prevailing standards of interpretation of Section 16(b). In fact, all that the Court of Appeals did was to apply the prevailing standard under Section 16(b), *viz.*, the lowest-in, highest-out technique for measuring insider profit on a purchase and sale of securities of the same class. Any other approach would have revolutionized and subverted administration of the statute.

With respect to the recovery of dividends on the Western Missouri stock, petitioner contends that plaintiff's recovery creates "constitutional problems of due process" (Petition p. 18). However, no authority is offered in support of this proposition. All four judges who considered this case below agreed that plaintiff was entitled to recover dividends. No element of the question merits review by this Court.

III.

The Decision Below Supports the Policy of the Statute

Contrary to petitioner's argument, it is patently clear that the decision of the Court of Appeals supports the policy of the Statute. Indeed, if the decision of the District Court had remained law, enforcement of Section 16(b) would have been gravely jeopardized.

It is apparent at the outset, both from the express language of the statute and from its purpose, that petitioner Gamble-Skogmo's intention in purchasing and selling the stock is irrelevant. Because of the difficulty inherent in proving the intention or motive of a 10% beneficial owner, the statute was designed to hold such a beneficial owner liable "irrespective of any intention or expectation to sell the security within six months." See Hearings Before the Committee on Banking and Currency on S. Res. 84, 72d

Cong., 2d Sess., and S. Res. 56 and S. Res. 97, 73d Cong., 1st and 2d Sess. 1934, 6557, See, *e.g.*, *Smolowe v. Delendo Corp.*, *supra*, 136 F. 2d, at 235; *Stella v. Graham-Paige Motors Corp.*, 132 F. Supp. 100, 102 (S.D.N.Y. 1955), *cause remanded*, 232 F. 2d 299 (2d Cir. 1956), *cert. den.*, 352 U. S. 831 (1956); *Carr-Consolidated Biscuit Co. v. Moore*, 125 F. Supp. 423, 427 (M.D. Pa. 1954); Yourd, *Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act*, 38 MICH. L. REV. 133 (1939). Similarly, the fact that the purchase and sale were transacted in good faith and without any actual inside information can be no defense. See, *e.g.*, *Walet v. Jefferson Lake Sulphur Co.*, *supra*; *Smolowe v. Delendo Corp.*, *supra*; *Arkansas Louisiana Gas Co. v. W. R. Stephens Investment Co.*, 141 F. Supp. 841 (W.D. Ark. 1956).

As we have shown, the Court of Appeals did no more and no less in this case than apply the lowest-price-in, highest-price-out standard in determining the amount of profit realized by petitioner. No other approach was permissible, because this is the only formula which, when consistently applied, will prevent *all* short-term profits and, hence, effectuate the remedial purpose of the statute. "We must suppose that the statute was intended to be thoroughgoing, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty." *Smolowe v. Delendo Corp.*, *supra*, 136 F. 2d, at 239. The single formula which assures the recovery of all possible profits is that of lowest-price-in, highest-price-out, within six months, irrespective of the identity of the securities involved. *Ibid.* And see *Gratz v. Claughton*, *supra*, 187 F. 2d, at 51-52.

The District Court refused to abide by this rule and, in permitting its determination to turn upon the identification of stock certificates, it ignored the underlying policy which prompted the adoption of the recognized formula. The application of the formula cannot be made dependent upon a preliminary, subjective determination of whether the insider has attempted to avoid the impact of the statute, or whether there is a danger of its evasion. So indefinite an approach undermines the Congressional purpose to bypass the question of the insider's blameworthiness in each case in favor of a clear-cut rule that will categorically prevent such evasion.

If the approach of the District Court were to prevail, an appearance of honesty and sincerity would permit a 10% beneficial owner easily to avoid the impact of Section 16(b) by holding any given stock certificate for more than six months while dealing with other stock certificates within a six-month period, all in reliance on inside information. See, *e.g.*, *Gratz v. Claughton, supra,* 187 F. 2d, at 50-51. Similarly, it could insulate from liability a seemingly upstanding 10% beneficial owner who purchases stock, gives it to his son, and, within less than six months after that purchase, sells the remainder of his entire holdings of that stock at a price greater than what he paid for the shares given his son. Or, such a 10% beneficial owner could, without liability, purchase a block of shares, sell those same shares at cost shortly thereafter, and, within six months of the purchase, sell his remaining shares at a higher price. It is obvious, therefore, that acceptance of petitioner's argument and the conclusions of the District Court would open the door to wholesale circumvention of the statute.

The District Court seems to have veered from the set-

tled course of the law out of apprehension that a finding of liability would lead to a harsh result in this case. But that result is not one iota more harsh than the Congress intended in enacting this statute. The result in this case is, as we have shown, demonstrably related to a genuine profit. By contrast, in *Gratz v. Claughton, supra,* the court affirmed a judgment of $300,000 against the insider-defendant although he suffered an actual net loss of over $400,000 on trading in the stock for which he was charged under Section 16(b). See *Adler v. Klawans,* 267 F. 2d 840, 847-48 (2d Cir. 1959); 2 Loss, SECURITIES REGULATION 1963-64 (2d ed. 1961). As Judge Hand pointed out in that case, such "crushing liabilities" should "certainly serve as a warning, and may prove a deterrent" (187 F. 2d, at 52). To warn and deter, are, of course, the very objects of the statute's existence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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